UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

COLLINS, Plaintiff,	:	11-CV-00766 (FB)
v.	:	
THE CITY OF NEW YORK, et al., Defendants.	:	225 Cadman Plaza East Brooklyn, New York July 25, 2013

TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONIC HEARING
BEFORE THE HONORABLE ROBERT M. LEVY
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: JOEL B. RUDIN, ESQ.
Law offices of Joel B. Rudin
200 West 57th Street, Suite 900
New York, NY 10019

For the Defendants: ARTHUR LARKIN, ESQ.
ELIZABETH N. KRASNOW, ESQ.
ANGHARAD WILSON, ESQ.
The City of Yew York Law Department
100 Church Street, Rm. 3-177
New York, NY 10007

Court Transcriber: SHARI RIEMER
TypeWrite Word Processing Service
211 N. Milton Road
Saratoga Springs, New York 12866

Proceedings recorded by electronic sound recording, transcript produced by transcription service

(Proceedings began at 2:03 p.m.)

THE COURT: I think the record is working.

Docket 11-CV-766, Collins v. The City of New York.

Counsel, please state your appearances for the record.

MR. RUDIN: For plaintiff, Joel Rudin. Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. LARKIN: Good afternoon, Your Honor. For City defendants Arthur Larkin, L-A-R-K-I-N, and with me is my co-counsel Elizabeth Krasnow, K-R-A-S-N-O-W and Angharad Wilson, W-I-L-S-O-N. Good afternoon.

THE COURT: How do you spell the first name?

MR. LARKIN: A-N-G-H-A-R-A-D.

THE COURT: Thank you. So why don't we start with the hotel logs. I think there are two pending issues before the Court. There's the in camera review and there's the hotel log issue. I've received I think all of -- I've received three sets of letters, three submissions. So I think the briefing is complete on that.

Mr. Rudin, do you want to go first on that?

MR. RUDIN: Sure. I think I laid out our position completely in the letters. I don't think that the City has in its letter really made any effort to contradict what I wrote in the initial letter that the issues that the hotel custody

files relate to are in the case. I thought that they were addressed more to the issue of whether or not we should provide the 50 files that we proposed as the initial files that we would inspect. I addressed that in the letter. It seems to me that the 50 will comprise -- a lot of them will be the files that where we've reviewed the logs. We're waiting for the copies but after we get the copies I would designate which of those files we're most interested in and then in addition there would be -- each custody file has a number so I would indicate the numbers that probably would be closest chronologically to the witnesses from the Collins case. Some of the files may be missing. So if any are missing I would ask that the additional files that are close chronologically that we be able to inspect them.

The reason is that I think that those files will contain additional information about the circumstances under which those witnesses were -- wound up in hotels and the conditions under which they were held. In particular we would like to see whether that printed form that -- where there's a designation of whether the witness is being held as a prisoner we'd like to see whether those forms are there. So that's the first issue.

The second issue -- I don't think there's been any contention that there's any real burden. I addressed that in my letter.

The third thing is the City makes an arguments about the merits of our claims to which the hotel custody files relate and I responded to some of the factual allegations that they made but it seemed to me what they were really doing was rearguing the motion to dismiss or making a [inaudible] summary judgment motion and I didn't think that -- I didn't think it was appropriate for me to respond fully to their argument unless Your Honor wanted me to.

THE COURT: Well, I didn't think you could have within the page limits anyway.

MR. RUDIN: That's true.

THE COURT: So that's fine. Mr. Larkin.

MR. LARKIN: Yes, Your Honor. If you look at Judge Block's decision he -- in the February 13th decision he concludes that the plaintiff has a claim or has pleaded a Monel claim for basically ratification of misconduct by Vecchione and then he -- the court further says that the theory hinged solely on Hine's response to an isolated incident but says he further alleges that despite scores of cases involving Brady violations and other misconduct Hines has never disciplined an assistant. We went back and looked closely at what those 50 cases are, what those cases are as been cited and what we see -- and I don't know if we spelled this out in this particular letter to Your Honor. We really didn't but as to sort of flush out our argument I wanted to

add some of these points. Only two decisions that we can see appear to relate in any way to the use of subpoenas or warrants, most importantly material witness warrants. There's really only one decision that relates to the material witness part and in that case the Rust, People v. Rust, the alleged misconduct had nothing to do with the issuance of the warrant in that case.

Here, the record is extensively developed already as to what happened in connection with Santos. There's no claim that there was ever a warrant used or executed with respect to Diaz. That didn't happen. With respect to Santos, there was a warrant issued signed by a judge where Santos was brought to civil jail and the state courts -- the state courts have said in a line of cases that the defendant -- the [inaudible] defendant doesn't have any rights in that connection, in connection that is with the issuance of a material witness warrant.

So there's no constitutional violation here. There's no pleaded pattern of cases concerning the alleged misuse of material witness warrant. Judge Block never said I his decision that there was a claim or that there was an alleged practice of material witness warrants. I mean the closest the court ever came to saying that is noting that there were scores of cases according to the complaint regarding Brady violations and other prosecutorial misconduct.

To the extent that there are such cases they're tied to or related to the ratification claim.

I think at this stage of the case the court is entitled to look a little bit at what the record shows when the plaintiff is asking for 50 custody files, 50 files of individuals who were put into protective custody for their own safety. It's clear that nothing went on with respect to Santos that violated Mr. Collins' rights. So I think at some point, Your Honor, that the court ought to draw a line about where the burdens are and where the [inaudible] of all this discovery that the plaintiff wants.

There's still going to be extensive depositions and other discovery about other cases involving disclosure, non disclosure of material facts and it seems to me that's where the constitutional claim if any lies, not in whether or not witnesses were put in hotels in other cases. I guess our view is given the very limited relevance of the discovery it seems that it -- the burden of producing the discovery outweighs its value in this case.

MR. RUDIN: Your Honor, may I briefly respond?

THE COURT: Yes.

MR. RUDIN: Of course the -- this is a 106 page complaint and I put in as much detail as I did and as much evidence because of my uncertainty about how the Supreme Court decisions about pleading would be applied. But clearly the

standard is plausibility and there's no question that we pleaded abuse of process, coercion of witnesses. Specifically we talked about misuse of the material witness process. I cited testimony from a criminal case where the ADA testified that the office practice was to pick people up on material witness warrants and bring them back to the office. We cited Santos' testimony about how he was held in a jail and then held in a hotel against his will and Judge Block found the -- noted that we had witness coercion and abuse of process claims.

He then found that we were entitled to receive discovery about all the claims. He said that -- he talked about the lack of any corrective action might also reflect a passive policy on Hines' part to condone whatever subordinates deemed necessary to secure a conviction and then he talked about Brady violations and other prosecutorial misconduct. Misconduct by Vecchione, underhanded tactics. I mean these are -- this is the language that Judge Block used. He didn't limit it to a Brady claim. He took note of all the claims. He did not dismiss any of the claims and allowed discovery to proceed.

So for us to be limited to the specific cases of misconduct and failure to discipline that we knew about and put in the complaint without being allowed to -- now that the motion to dismiss has been denied then we're not allowed to

fully develop those facts I don't think is the way that the procedure is supposed to work or the Supreme Court had in mind or all of a sudden what Judge Block had in mind.

The second thing is that we spent a great deal of time trying to develop these claims in depositions. I spent a great deal of time investigating other cases to show -- and one of them of course is the Cassada [Ph.] case where the very [inaudible] process occurred we believe but the other side disputes that and everything that we've been trying to show in developing the facts relating to some other cases which the other side disputes -- but here we have a form that they use, their printed form that refers to people as prisoners. We have their memorandum that refers to holding people, to guard them against escape and we have these hotel custody logs which make reference to prisoners, to shackles, to doors being locked, people being -- rooms being secured which completely coincides with Santos' account of how his door was shackled and he wasn't allowed to leave.

So it seems to me that these records may shortcut the discovery process and make our case much simpler. If there are records that on their face acknowledge that witnesses were being held prisoner or being held against their will or their rooms were shackled, they weren't allowed to leave, if there are records that show that witnesses were being picked up with material witness warrants and taken to

hotels and held overnight until they testified the next day without being brought to court or even if there are records that help us show that some witnesses maybe were brought to court and the material witness orders maybe were vacated and they were -- the District Attorney took custody of them and then they were held against their will in rooms that were locked -- some of them may have gone "voluntarily" after they were picked up on a material witness warrant, they could have changed their mind. They might have wanted to leave but their rooms were locked.

There's nothing I've seen in any other jurisdiction. Your Honor of course is familiar with federal witness protection -- witnesses are guarded, sometimes they're kept in hotels but they're allowed to leave. So this is an extraordinary situation and I think that this proves that we're trying to get -- may greatly simplify the case because it's documents that will directly show a pattern and a custom and a practice that Mr. Hines it's hard to believe was unaware of and of course I would depose him about his awareness of it and his toleration of it.

So it seems to me this is very relevant to a significant part of our case and of course it also relates to Brady because in many instances we believe that where witnesses were held against their will or as prisoners in hotels that [inaudible] Collins case and the Cassada case it

wasn't disclosed to defense counsel under Brady. We can't really develop that unless we have the evidence that the witnesses were held against their will. We need to know the specific cases and then we can recess the transcripts and potentially with the permission of the court because I did indicate to Mr. Larkin that we would seek that permission first, attempt to interview some of the defense lawyers particularly in the cases where the witness' identities are already known because they testified publicly. All [inaudible] would have to be that they testified because only then would it be relevant to Brady.

So I just think that this is going to greatly short circuit the case. It would make it much simpler and it will make it less necessary to try to reinvestigate individual cases and take testimony from various witnesses about what happened when it's going to be right there I the DA's own files.

Regarding Diaz, I mean this -- there was a material witness order for Diaz. The City's position is that Diaz came back "voluntarily" and I believe Vecchione -- I mean he had a failure of recollection to a great extent. I don't remember now whether he testified that he -- he testified that he didn't ever see the order after it was obtained and wasn't aware that someone had signed it and notarized his signature but we still have to depose the detective investigators about

how -- who received that order and how it was used. I mean was it Fed Ex'd to Mr. Vecchione. Either it was faxed to Mr. Vecchione and we -- Diaz may be deposed as well. So it may very well be that it was made known to him that there was an order and that he was either going to come back in shackles under that order or he was going to come back so-called voluntarily and it seems to me that it's a peril situation although I don't have any evidence that he was held against his will in contrast to Santos.

THE COURT: Okay.

MR. RUDIN: Just one other thing. I'm sorry. Your Honor, may I add one other thing?

THE COURT: Yes.

MR. RUDIN: The material witness, they cite cases in which some intermediate state appellate court have held that a defendant doesn't have a right to be -- a criminal defendant does not have a right to be present in a state material witness proceeding but that's a very different issue from whether or not the District Attorney can [inaudible] the material witness process in a way that we allege happened here as a matter of custom and policy or withhold disclosure to the defense under Brady.

THE COURT: Mr. Larkin, could you address the issue of burden for me, please?

MR. LARKIN: Sure. We're talking about -- I don't

know how long it's going to take to gather the 50 files, get them copied and produced but I think -- I'll get that information from our client but I think that what plaintiff -- in terms of burden what plaintiff is contemplating is a substantial and apparently exponential increase in the work that's going to have to be done in the case if counsel wants to then make -- wants to then determine whether or not disclosure of witness arrangements or witness hotel arrangements were made in specific cases. I suppose depending on the facts of the case that information might constitute Brady but there's going to be a huge associated burden now with going back to looking for old files, old cases, more old cases, some of which may be sealed to determine whether disclosures were made and then to argue the legal point whether or not the disclosures we [inaudible] under Brady when in most of these cases almost every one of these cases the witness is the one who's afraid and won't come forward to testify and that's why you need to get the material witness order in the first place.

I think Judge Pohorelsky made that issue -- made that clear during one of the hearings in the Cassada case. So it really -- it contemplates a much greater burden on us not just in looking for those specific old files which I don't know -- I don't know where they are kept. I don't know if they're kept in one place or if they're kept with each

particular case file.

In this instance, Your Honor, I do know that the witness [inaudible], there were five or six of them were kept with the DA's main file. So if it's a matter of going to one place and pulling say 50 files that are in one place that's not a heavy burden I would concede. On the other hand, if the witness files are located in other -- if they're in their individual -- if they're in the case files associated with the case that they testified in then it's a matter of going through 50 individual cases and pulling those files.

So I confess, Your Honor, I do not have the answer to that question, that specific question.

THE COURT: So let me just give you my take on this. My take on this is number one, that the difficult truth I think for all of us is that Monel claims are incredibly labor intensive for the parties and for the court and that any -- I'm sure we discussed this many times before but that any time there's a Monel claim that's allowed to go forward that Monel claim involves discovery that cuts across time lines and sometimes burdensome, sometimes not, but generally increases the burden exponentially for all the parties, and I think that's just a given in this case. Because Judge Block has authorized the Monel claims to go forward there is that burden that we've all been experiencing.

With respect to the hotel log, my reading of Judge

Block's decision and I think the uncontradicted argument by the plaintiff is that the court allowed this type of -- let me just get to the exact quote here. The allegations that the District Attorney was indifferent from the abuse of lawful process to gain custody or [inaudible] witnesses. Just the -- the decision itself is not limited to Brady I don't think with respect to Monel but even if it were I think that these issues would and could be explored.

The problem that I think we're all having here is that there's a distinction between relevance and merits and sometimes that distinction gets blurred because the burden benefit analysis often depends on how strong the merits are. What I don't want to do is have a mini trial or a mini summary judgment motion on the merits of the arguments and whether Santos is telling the truth or not and on the legality of some of the practices.

I think what I'd like to do is take it step by step at this point. I'd like to -- I think the plaintiff is entitled to explore the hospital log -- the hotel logs and 50 -- if the files are located in an area that's reasonably simple to search then I think 50 wouldn't be burdensome. If the defendants come back and show me that the burden is really exceptional then I would reconsider the number of files and perhaps reduce the number to something that's a little more manageable. But my guess is that it may not be as difficult

for you to find. I think that the challenge for all of us is how to keep this litigation on track and not let this turn into a satellite litigation with all kinds of explorations of Brady issues and basically retrying or briefing each one of the cases that opens up.

I just want to say that at this point I'm not contemplating that that's something that we would do. I don't see that it would be in any parties interests or appropriate to go into vast discovery on each one of these cases. I think, Mr. Rudin, you're not looking to do that either, are you?

MR. RUDIN: No, I would very much like to avoid it.

THE COURT: Because it would prevent your case from getting to trial when it should.

MR. RUDIN: Well, also it would make the trial very [inaudible].

THE COURT: Exactly. I think the jury for both sides would lose their patience.

So if we go ahead with the 50 and they tend not to be burdensome that is going to -- is not going to lead to broad discovery. It's going to -- there's going to be limited discovery to the extent that I can reasonably do that.

MR. LARKIN: Your Honor, this is Arthur Larkin speaking. A question for the court. I don't know exactly which 50 files we're talking about.

THE COURT: Right. Right.

MR. RUDIN: I'll -- I'm sorry, I don't mean to interrupt.

THE COURT: Go ahead.

MR. RUDIN: I thought I could answer your question but if you want to continue.

MR. LARKIN: I just want to continue with one other point. I understand fully what Your Honor is saying. I thought that the fact of Santos was unequivocal in that he was not gorged and that he told the truth suggests that really wasn't any violation of Mr. Collins' rights in this case. I do understand what Your Honor is saying about [inaudible] merits with the relevance of discovery and I understand the court's ruling. I don't want to revisit it. I just wasn't -- Santos' statement under oath in a proceeding in which Collins himself took the testimony through his counsel where he unequivocally said I had told the truth and no one told me to lie and they told me to say the truth and that's what I did. I think that really ought to count for something significant here in terms of managing discovery.

THE COURT: Well, but then Mr. Rudin comes back and says that Judge Irizarry elicited from Santos that I think they took me straight to jail, I think they did, he never went to -- before a judge, et cetera, et cetera. Reportedly -- there just seems to be enough of a factual dispute here that

it would not be proper for me to cut off -- to make a ruling as to his credibility and cut off discovery.

MR. LARKIN: I understand. I understand, Your Honor. So I guess the next step would be if plaintiff could identify the files we'll then take that back to our client and find out how they're kept and if they're in one place where they can easily search then that makes it a lot easier and if not we'll inform the plaintiffs and we'll inform the court.

And I just wanted to ask one more question if I could, Your Honor.

THE COURT: Sure.

MR. LARKIN: That is could we -- could these documents be kept for now at least under a protective order?

THE COURT: Yes.

MR. LARKIN: We -- thank you. Thank you very much. We will be submitting for the court's consideration a proposed protective order which we provided a copy to plaintiff and plaintiff had objections to some of the provisions. We're going to submit a revised draft for the court's consideration and hopefully once it's acceptable to Your Honor it could be entered and then it would govern discovery going forward.

But for this particular area with these custody files I would ask for a confidential treatment for now.

MR. RUDIN: I would agree to that.

THE COURT: I'm hoping that you'll be able to agree

to the protective order, both sides on that, because I think it's critical. My concern -- I understand the City's concern and if some of the information is not publicly available particularly the identities of the witnesses the court would understand an attorney's eyes only.

MR. RUDIN: I received an initial draft. I had quite a few objections to it. If there's a revised draft, Arthur, you might want to submit -- let me review that. Maybe we can --

MR. LARKIN: We will do that.

MR. RUDIN: -- narrow the issues to just a few.

As far as the 50 files, I believe July 26th is when the City is supposed to provide to plaintiff copies of the hotel custody logs that we reviewed and then after I receive that material I can designate the 50 files. A lot of the files will be the files that we reviewed the logs and then we want the actual witness files. Then there will be some additional ones I indicated before that probably will be selected somewhat arbitrarily based upon chronological closeness to the events in our case. If any of the files that we designate prove to be a problem because the defendant was acquitted or the case was dismissed and the witness -- and the files were sealed I guess we would just ask that other files be made available for inspection which I guess we would -- we will figure out some order perhaps and then they can just go

down the list. Of course I wouldn't want the defendants to select the additional files. I'd rather select them and then we can figure out which 50 [inaudible] problem.

Also, to try to make this a little easier, I indicated that we would be willing to inspect rather than have everything copied unless defendants think that that doesn't help them.

But the other thing is that I think in the Collins case at least based on the testimony we received so far and we reviewed in discovery, the witness custody files were not with the case file until after the -- either after there was a FOIA request at some point or perhaps even after the 440 motion was filed and I think the usual practice is that they're kept in a separate place under the control either of the witness relocation unit or the detective investigators. I saw some reference to the Chief Deputy Investigator Ponzi being asked during the 440 motion to retrieve files of this nature and there was some back and forth. So I don't know [inaudible] but I think that it's very unlikely that as a matter of routine that these files are with the case files.

MR. LARKIN: We'll definitely check. If they're not then it will make it a lot easier I think.

THE COURT: If for some reason it does -- you believe it is burdensome try and meet and confer on that to see if you can designate other files. Otherwise bring it to me.

MR. RUDIN: Sure.

MR. LARKIN: Yes, we will, Your Honor.

THE COURT: Now let's go to the in camera review. The ruling comes in two parts. The first part has to do with the partially redacted documents. I find that all the partial redactions are appropriate. There's nothing in there that meets the standard for core attorney work product and nothing that would help the plaintiff on the issues that he [inaudible] for me.

With respect to the other documents, what I'm focusing on at this point is whether or not the information is available from other sources. My conclusion at this point is that it is available from other sources specifically through the depositions that you haven't completed yet and that what I'm going to ask you all to do, and I'm going to keep these documents because I'm going to ask you to take those depositions asking the questions that have been flagged for me and if the answers are not sufficient then, Mr. Rudin, you can come back to me and I'll consider whether or not that information was in fact available from other sources but I do believe that that information was -- will be available -- pretty much everything that's in these emails will likely be available through depositions.

MR. RUDIN: Okay. Your Honor, there is one other issue [inaudible].

THE COURT: Sure.

MR. RUDIN: I've had discussions with Mr. Larkin about this and I think we're in agreement that given the amount of document discovery that still has to occur and the possibility that there will be some further issues that will have to be resolved and given the vacation schedules that we cannot possibly complete discovery by the end of August. Of course Mr. Hines is now going to be at some point late in September approximately. So Mr. Watkins indicated that he's interested right now in taking about eight depositions. Maybe that will grow and contract and we have quite a few to take and a lot of them will depend upon what discovery we get concerning discipline as well as the witness protection issue.

So we're in agreement that it would make sense to push back the deposition like to the end of October if that's acceptable to the court.

THE COURT: All right. I would say that no one can accuse you of not working hard on this case on both sides.

MR. RUDIN: Thank you. I think it's been quite a [inaudible].

THE COURT: Yes, the end of October is fine.

MR. RUDIN: I still would like to depose Mr. Hines towards the end of September because I'm quite confident there will be some additional depositions I want to take after. So I wouldn't want to be at the end of October and then we have

to go beyond October. If it turns out that there's some reason we have to go beyond October then I'm sure we can address it but I think both sides would like to finish by the end of October and from our point of view that would mean doing Mr. Hines at some point during the end of September.

MR. LARKIN: Well, Your Honor, my co-counsel Elizabeth Krasnow is going to be on vacation September --

MS. KRASNOW: Your Honor, this is Elizabeth Krasnow. I was waiting to plan it because of the depositions that have already been kind of up in the air with the parties' recent discussions. I think it's going to end up being the week of September 30th. So to the extent plaintiff is going to be inflexible about DA Hines' deposition then we might have an issue.

MR. RUDIN: I'm not going to be inflexible. I would like to do it the last week of September. If that for some reason really can't be done then we can do it after you get back.

MS. KRASNOW: All right.

MR. RUDIN: Then I may have to schedule some other depositions fairly quickly to be able to finish by the end of October. So if it's at all possible to do it --

MR. LARKIN: If counsel wants other witnesses --

MR. RUDIN: I understand.

MR. LARKIN: This is the issue that we had raised

with the court is that the whole point of a policy maker deposition is that you get what you need -- you're supposed to get what you need from other witnesses first and then if you can't then you do the policy maker last. I don't know why we're having a discussion now about doing the policy maker first and doing other witnesses after that.

THE COURT: Let me see if I can help you all out on this.

MR. LARKIN: Yes, Your Honor.

THE COURT: Ms. Krasnow, you're just going to be gone the week of September 30th?

MS. KRASNOW: That's the plan, Your Honor. Before I thought the DA's deposition would be the week before but now --

THE COURT: I understand.

MR. RUDIN: That's what we're talking about.

MS. KRASNOW: Right.

MR. RUDIN: So there's no issue.

THE COURT: I just want to be sure that I'm not the only one who doesn't understand. So the DA's deposition is going to be the week of the 23rd of September?

MS. KRASNOW: No. At the last conference, Your Honor, I believe the DA's deposition would be the week of September 30th.

THE COURT: Right. So I'm hearing now --

MS. KRASNOW: Now I'm just thinking that now that we have a discussion about a little bit more flexibility with deposition dates that I was hoping [inaudible] and I just wanted to make everyone aware that it would be that week.

THE COURT: You're getting a vacation. It can be that week. I just wanted to see if I understood that Mr. Rudin whether he's changed his mind and the week of the 23rd would work for him. If not --

MR. RUDIN: No, I got confused. The 25th is when I have that oral argument in the Second Circuit --

THE COURT: That's right.

MR. RUDIN: -- in the [inaudible] case.

THE COURT: So the discovery deadline is not October 31st. It's November 8th.

MR. RUDIN: That's fine.

MS. KRASNOW: Thank you, Your Honor.

MR. RUDIN: I didn't mean to conflict with vacation.

THE COURT: Are we all set? Our next conference is October 8th. If you need one before that which I'm hoping you don't but if you do you know where to find me.

MR. RUDIN: Do we have a time on October 8th?

THE COURT: Yes, we do. Let me see. It is at 3:00.

MR. RUDIN: Okay, great. Thank you very much, Your Honor.

THE COURT: Thank you.

MR. RUDIN: Thank you.

THE COURT: If I don't speak to you have great vacations and don't think about the case.

MR. RUDIN: Arthur and I are going on a retreat together.

(Proceedings concluded at 2:38 p.m.)

* * * * *

I certify that the foregoing is a court transcript from an electronic sound recording of the proceedings in the above-entitled matter.

Shari Riemer

Dated: August 2, 2013